A Review of Recent Cases in the Courts for the Quarter Ending December, 1919

IN THE September number of this Journal we published a review of recent decisions, chiefly in the courts of California. Several of our subscribers have suggested that this sort of a review should become a permanent feature of our publication. We agree with our correspondents that the chief function of a law review should be to review the law, and that a fairly complete summary of the legal progress of a particular state or section is a desirable contribution to such a review. On the other hand, the law in our opinion is not to be found exclusively—perhaps at the present day not even chiefly—in the decisions of courts, though our inveterate professional habit is still to picture it as wholly contained in those calf, sheep and buckram books labelled reports, to be found in lawyers' offices and law libraries. A review of local case law to be fairly complete ought to be supplemented by reviews of general American and foreign case law, of legislation and of the progress of the science of jurisprudence, the materials for the latter to be found for the most part in the law journals. General articles and monographic notes are also indispensable. In another part of this issue will be found a contribution by Professor Radin calling attention to recent developments in foreign law, and it is hoped that in future numbers we shall from time to time be able to supply other reviews of a similar character.

The present digest of recent decisions does not profess to be absolutely complete. It contains a summary of those cases, chiefly in California, that have come to the writer's notice and seem to be interesting for one point or another, with some comments, not pretending to be authoritative and offered with all humility. A few decisions in the United States courts are also referred to. Though it is believed that most of the decisions of the California Supreme Court since September containing points of general interest are referred to, space has prevented the notice of many interesting decisions by the California District Courts of Appeal.

I. Constitutional Law.

In the field of constitutional law, the outstanding case is *Abrams v. United States*,[1] and that is mainly interesting for

[1] 40 Sup. Ct. Rep. 17.

Justice Holmes' dissent. The defendants were found guilty under the Espionage Act of writing and printing language "intended to incite, provoke and encourage resistance to the United States in the war," and ". . . . when the United States was at war with the Imperial German Government . . . . ." conspiring ". . . . unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war with intent by such curtailment to cripple or hinder the United States in the prosecution of the war." They were found guilty and sentenced to twenty years imprisonment. The pamphlet issued and circulated by the defendants was not directed against the war with Germany: its purpose plainly was to excite opinion against intervention in Russia. But in the course of its extremely violent appeal to the "workers of America," it advocated a general strike and even resort to arms, if intervention in Russia were attempted by the United States. There is not the slightest doubt that the pamphlet in advocating a general strike did "urge the curtailment of the things necessary to the prosecution of the war," but it is by no means evident that this was done "with the intent by such curtailment to cripple or hinder the United States in the prosecution of the war." It is worthy of note that the language just cited is not quoted in the majority opinion, though it forms the material basis for the dissenting opinion of Mr. Justice Holmes, concurred in by Mr. Justice Brandeis. The only portion of the majority opinion in which allusion is made to the portion of the statute requiring a specific intent is the following, ". . . . the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and ammunitions necessary and essential to the prosecution of the war as is charged in the fourth count." Mr. Justice Clarke's paraphrase of the statute, aside from its evident confusion of "purpose" and "intent," places the emphasis on the wrong clause of the act. The intent required by the statute is one "to cripple or hinder the United States in the prosecution of the war." The dissenting opinion of Mr. Justice Holmes is a noble expression of the philosophy underlying the right of free speech: "the best test of truth is the power of the thought to get itself accepted in the competition of the markets." Again ". . . . we should be eternally vigilant against attempts to

check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

New York Central Railroad Company v. Bianc[2] lays down the principle that a workmen's compensation act imposing liability without fault for facial disfigurement suffered by a workman in his employment, though such disfigurement does not diminish his earning power is not violative of the fourteenth amendment. The Supreme Court of the United States has thus again refused to enshrine as a sacred formula "the nineteenth century philosophy of law that put the free human will in the central place as that upon which everything must turn . . . . a dogmatic reduction of all liability to contract and tort, to liability to perform what one had freely undertaken and liability to answer for harm which he had culpably caused."[3] The police power was also involved in the California cases of *In re Rust*[4] and *Riley v. Chambers*,[5] the first sustaining a statute regulating the practice of optometry, the second, a statute regulating the conduct of real estate business in part through the creation of a Real Estate Commissioner.

Two cases on the subject of interstate commerce are of some interest. *Pennsylvania Railroad Company v. Public Service Comission*[6] denies the state the power to "supplement" the activities of the Interstate Commerce Commission in providing safety appliances. *Groesbeck v. Duluth &c. Railway Company*,[7] a case on rates, is of general interest for the very distinct recognition by Mr. Justice Brandeis of a fundamental principle in our system of case law—the process by which fact becomes law. At present, he finds, "the science of railroad accounting" has not yet evolved a universal formula "for dividing charges and expenses common to freight and passenger services and not capable of direct allocation." And so, for "the present, at least, the question what formula the trial court should adopt presents a question, not of law but of fact."

Some of the most difficult questions in our legal system arise in the field of taxation. In *Maxfield v. Bugbee*[8] the justices of the

[2] 40 Sup. Ct. Rep. 44.
[3] 33 Harvard Law Review, 87 (November, 1919).
[4] 58 Cal. Dec. 185.
[5] 58 Cal. Dec. 477.
[6] 40 Sup. Ct. Rep. 36.
[7] 40 Sup. Ct. Rep. 38.
[8] 40 Sup. Ct. Rep. 2.

Supreme Court of the United States divided five to four upon the question whether New Jersey had power to tax by means of a so-called "transfer tax," a transfer by will or intestate law of the property of non-residents of New Jersey, the amount of the tax being graduated in proportion to the whole value of the decedent's property. The estate of a non-resident millionaire including a few thousand dollars worth of property in New Jersey would thus be subjected to a greater tax in respect to the same amount of property in that state than would a smaller estate. The majority opinion tries the tax by the various tests under the fourteenth amendment and other clauses of the Constitution seeking to preserve uniformity, and finds that the New Jersey law does not fail to meet the requirements of these tests. The minority opinion, adopting the modern realistic theory that law should be viewed not wholly from the aspect of formal coincidence with received norms, but, in some admittedly undefined degree, from the viewpoint of its actual operation, asserts that New Jersey was really taxing property, not levying a fine for the privilege of making a transfer.

II. Administrative Law Including Municipal Corporations.

It is difficult at times to separate the field of administrative law from that of constitutional law, particularly as a practical matter. *United States v. Lane,*[9] an attempt to compel the issuance of a patent by mandamus, illustrates this fact. The power of the General Land Office, Mr. Justice McKenna declares "necessarily is something more than ministerial . . . . and yet on the other hand not arbitrary. . . . In other words the Land Office is like any other tribunal—its institution and purpose defining and measuring its powers, the determining elements being those of fact and law, upon which necessarily judgment must be passed." With this statement compare the quotation made from Maxwell v. Civil Service Commission[10] by the Supreme Court of California in *Pratt v. Walcott,*[11] sustaining the exercise of discretion by the Civil Service Commission of San Francisco: "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but that is their question. Such boards

[9] 40 Sup. Ct. Rep. 33.
[10] (1915) 169 Cal. 336, 146 Pac. 869.
[11] 58 Cal. Dec. 206.

are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere."

The powers and duties of naval officers were involved in *Cartas v. United States*,[12] which held, following the Acts of Congress and Navy Regulations, that the United States was not liable as a depositary on account of valuables received by a navy officer on an American war ship.

Several taxation cases decided by the Supreme Court of California are of interest. *In re Brix* [13] decides that a transfer by a husband to his wife, on the occasion of the settlement of property rights upon divorce, in consideration that the wife give up her rights in the community property, was a transfer for a "valuable consideration." A life estate was reserved to the husband, so that the property would have been subject to inheritance tax, but for the fact just mentioned. The court discusses the question of "adequacy" from the same point of view as if it were considering a question of specific performance. Possibly so far as concerns the state's power to tax or raise revenue a different meaning might have been attached to the words "valuable and adequate" from that which the words connote in the law of contracts. *Southern Pacific v. Richardson*[14] also deprives the state of revenue, though the operation of the decision is within a narrow field. It holds that the so-called "creek route" ferry between San Francisco and Oakland is not taxable to the Southern Pacific Company under the gross receipts tax, though owned and operated by that corporation, for the reason that it is operated as a distinct public utility, and not as a part of the general system of the railroad. *Anaheim Sugar Company v. County of Orange*[15] involves the distinction between a special assessment and a general tax. The supervisors of a county may, in case of road divisions created under the provisions of sections 2745 to 2773 of the Political Code, levy a general tax upon the district. It was contended that a corporation by implication was created by the establishment of such a district. The Supreme Court, however, held that no necessity for the creation of a corporation by implication existed, and therefore rejected the contention. In *Cary v. Long*[16] it was ingeniously

[12] 40 Sup. Ct. Rep. 42.
[13] S. F. Recorder, Dec. 15, 1919.
[14] 58 Cal. Dec. 265.
[15] 58 Cal. Dec. 223.
[16] 58 Cal. Dec. 385.

argued that as judgment entered upon an award made in an arbitration changed the nature of an action of tort into a claim upon contract, the arbitration was in defiance of Article XI, Section 18, of the Constitution of California, forbidding municipalities to incur indebtedness or liability in excess of annual revenue, save by assent of two-thirds of the qualified voters. The contention was, of course, denied. The power of a municipality to enter into arbitration is clearly recognized by the decision. The city of Madera, it seems from the decision in *City of Madera v. Black*,[17] undertook to raise revenue in a novel way. It imposed a monthly rate on each house for connection with the sewer. The charge was plainly not for the purpose of maintaining the sewer system, but merely for general revenue. "Such means of raising revenue is so unusual and extraordinary that it cannot be implied from the grant of power to lay and maintain sewers," declared the Supreme Court, speaking through Mr. Justice Shaw. It is interesting to observe that such novel experiments are what give rise to new law. Though the present plan failed, doubtless other municipalities will attempt to follow the example of Madera, avoiding the pitfalls disclosed by this opinion.

III. Workmen's Compensation.

The Workmen's Compensation Act, which has removed a large part of the law of master and servant and of torts from the field of private law to that of administrative law, continues to give rise to numerous questions. *Bank of Los Banos v. Industrial Accident Commission*[18] holds that an employer who desires to carry his own insurance may be required to give bond before he can do so, though he is amply solvent. The general scope of the act was involved in *Flickinger v. Industrial Accident Commission*[19] and in *Worswick Paving Company v. Industrial Accident Commission*.[20] The former case held unconstitutional the attempt by the amendment of section 8 of the Compensation Act of 1917[21] to restrict the definition of "independent contractor" and consequently to enlarge the meaning of "employee." To determine who are "independent contractors" and who "employees," we must look to the definitions of those expressions as they existed in October, 1911, when the constitution was amended to permit the creation

[17] 58 Cal. Dec. 309.
[18] 58 Cal. Dec. 202.
[19] 58 Cal. Dec. 374.
[20] 58 Cal. Dec. 453.
[21] Cal. Stats. 1917, p. 831.

of the Industrial Accident Commission and the new system of employer's liability. The case is but a corollary of the decisions in *Pacific Gas & Electric Co. v. Industrial Accident Commission*[22] and *Carstens v. Pillsbury*.[23] In Worswick v. Industrial Accident Commission[24] it is decided that the statute, so far as it makes any other than the immediate employer liable, is invalid for the same reason.

The specially concurring opinion of Mr. Justice Shaw (approved by Mr. Justice Olney) in *United States Fidelity & Guaranty Co. v. Industrial Accident Commission*[25] points out that the act does not exempt the employer from liability, though the employee was guilty of wilful negligence, if the injury causes death. The majority opinion, however, proceeds upon the narrower ground that the evidence was not clear that the employee was violating the Motor Vehicle Act when he was killed, which violation was the alleged wilful negligence. The majority opinion resorts to the unfortunate and illogical process of weighing presumptions, though the reference was wholly unnecessary to the decision. The court says the evidence was not sufficient to show that the deceased was violating the law, "particularly in view of the presumption of law that he was not committing a crime, viz. violating the Motor Vehicle Act." Aside from the fact that there is no "presumption of innocence" in civil cases, however firmly established that unfortunate expression has become in criminal prosecutions, there is no place in our system of law for weighing presumptions.[26]

In *Continental Casualty Company v. Pillsbury*[27] a wife whose husband had deserted her, but who had a decree of maintenance, was held entitled to an allowance under the act. In *London Guarantee Company v. Industrial Accident Commission*[28] a wife who had obtained an interlocutory decree, without provision for her support, was not entitled to compensation for the death of her husband.

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[22] 57 Cal. Dec. 535.
[23] (1916) 172 Cal. 572, 158 Pac. 218.
[24] Supra, n. 20.
[25] 58 Cal. Dec. 190.
[26] Thayer, Preliminary Treatise on the Law of Evidence, 343, 347-8.
[27] 58 Cal. Dec. 339.
[28] 58 Cal. Dec. 393.

Krobitzsch v. Industrial Accident Commission[29] settles the somewhat narrow point that one engaged in the business of propagating trout for domestic use is engaged neither in "farm labor" nor "stock raising." The business was called a "trout farm," but "farm labor" must be defined from its generally accepted nature. A special watchman, who happened also to be a deputy sheriff and fire warden, was, in *Engels Copper Mining Company v. Industrial Accident Company,*[30] held entitled to compensation, where his work consisted in performing services not embraced within his official duties. *Bethlehem Ship Building Corporation, Ltd. v. Industrial Accident Commission*[31] involved the meaning of the words "proximate result." Poison from an infected foot, the foot having been injured in an industrial accident, was conveyed to the face. Death followed, and was held to be the "proximate result" of the injury. *Starr Piano Company v. Industrial Accident Commission,*[32] involving the question as to when the employee has entered upon his work, was commented upon in the November issue of this Review.[33]

IV. Procedure

Procedure, though it no longer dominates our legal system to the same extent as formerly, nevertheless gives rise to numerous points of difficulty and importance. *Majors v. Superior Court*[34] reaffirms Martin v. Superior Court[35] in relation to suits in *forma pauperis,* which a recent writer[36] designates as "an epoch making decision" and "the first ever to translate into action the fundamental constitutional principles of freedom and equality of justice." The Martin case is the subject of a note in a former number of this Review.[37]

The disqualification of judges was involved in *Favorite v. Superior Court.*[38] The fact that the judge's wife was a stockholder in a corporation which was a party to the action did not disqualify him. A liberal holding as to the waiver of the Statute of Limitations was made in *Union Oil Company of California v.*

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[29] 58 Cal. Dec. 445.
[30] 58 Cal. Dec. 411.
[31] 58 Cal. Dec. 421.
[32] 58 Cal. Dec. 379.
[33] 8 California Law Review 63.
[34] 58 Cal. Dec. 273.
[35] (1917) 176 Cal. 289, 168 Pac. 135.
[36] Reginald Heber Smith, Justice and the Poor, The Carnegie Foundation for the Advancement of Teaching, Bulletin No. 13, p. 29.
[37] 6 California Law Review, 226.
[38] 58 Cal. Dec. 284.

Purissima Hills Oil Company,[39] where a corporation was held bound by an acknowledgment signed by the president individually, and not in his official character. The circumstances, however, showed that he intended to act for the corporation. *Willett & Barr v. Alpert*[40] decides that an attachment cannot issue against a resident for breach of a contract to deliver rails. This is perfectly obvious so far as it involves an express contract, because no attachment in an action on contract can issue in California save on a contract for the direct payment of money. It was urged, however, that a common count would have lain at common law, and Mr. Justice Shaw, who dissented, thought that it would. The majority opinion, however, holds that a common count could not have been maintained at common law on the facts pleaded. However we may lament the fact "the forms of action continue to rule us from their graves."

"What's in a name?" The lawyer, in view of the elaborate title on misnomer, can scarcely answer as did the poet. A summons was addressed to the Southern Pacific Railroad Company, though it was actually served on an agent of the Southern Pacific Company. The fault was finally cured by amendment—blessed be he who devised the statute of jeofails—but not without some discussion and a "diversity" in *Thompson v. Southern Pacific Company.*[41] The "diversity" turns on the fact that the real defendant is he who is served, no matter how named, which, the court says, makes "a wide and essential difference" between the present case and Altpeter v. Postal Telegraph-Cable Company.[42]

Another case involving the law of parties is *Artana v. San Jose Scavenger Company.*[43] It was there held that in an action against a partnership in its partnership name, the members of the partnership had no right to plead as individuals, the court arguing on the basis of section 388 of the Code of Civil Procedure, that a partnership ". . . . for the purposes of the statute is regarded as a legal entity apart from its members." This recognition of the partnership as an entity is, however, for procedural purposes only. The case suggests several possible questions: Do the provisions in regard to the place of trial of civil actions apply in actions brought against partnerships? Has such an entity a

[39] 58 Cal. Dec. 408.
[40] 58 Cal. Dec. 523.
[41] 58 Cal. Dec. 77.
[42] (1915) 26 Cal. App. 705.
[43] San Francisco Recorder, Dec. 9, 1919.

residence? If so, is it where the partners reside, or where the partnership has its principal place of business?

The powers of an attorney at law are involved in two cases. In *MacDermot v. Grant*[44] it was held that the attorney alone has power to dismiss an action after submission. The plaintiff himself has no such power. The control of the litigation by the attorney, however, does not go to the extent of forbidding the plaintiff, who happens to be an attorney, from arguing his own case to the jury. This was decided in *Scott v. Times Mirror Company.*[45]

Raggio v. Southern Pacific Company[46] establishes that there is no duty on a plaintiff after argument and submission of a demurrer to inquire of the judge as to its disposition, nor is he affected by the fact that the term of the judge expires without a decision. A suit will not be dismissed for failure to prosecute by reason of the plaintiff's lack of diligence, if the alleged lack of diligence consists in the plaintiff's failure to "follow up" the judge. Manifestly public policy demands this holding.

Hirschberger v. Southern Pacific Company[47] was a case involving the tests as to what constitutes a waiver of the privilege against a physician's testimony. The question cannot arise in actions for personal injuries since the amendment in 1917 to subdivision four of section 1881 of the Code of Civil Procedure, but as the privilege continues to exist in other cases, the decision is of interest. Scott v. Times Mirror Company,[48] previously referred to, permits proof of distinct libels other than those involved in the action, for the purpose of proving malice.

How should bills of exceptions be settled where several judges make different orders? The case of Thompson v. Southern Pacific Company[49] raises the question but does not settle it. *Estate of Waters*[50] also deals with the review of decisions. The court in that case says that a motion for a new trial is "in effect a new action in the nature of a writ of error."

V. Commercial Law.

During the period of time covered by this review only a few cases of interest in commercial law, using that word in a broad

[44] 58 Cal. Dec. 319.
[45] 58 Cal. Dec. 321.
[46] 58 Cal. Dec. 404.
[47] 58 Cal. Dec. 90.
[48] Supra, n. 45.
[49] Supra, n. 41.
[50] 58 Cal. Dec. 475.

sense, have been decided by the Supreme Court. Possibly the reason for this is that commercial matters are much more likely than some other classes of cases to receive adjustment without resort to the weapon of litigation.

The irrevocable power of attorney is the subject of an elaborate opinion in *Todd v. Superior Court.*[51] A power of attorney to collect a legacy, though expressly made irrevocable and accompained by a formal assignment of the legacy, was held revocable. The proposition that a power not coupled with an interest cannot be made irrevocable is an example of a standing contradiction—though by no means a unique example—of the principle, so much emphasized in our system, of liberty of contract. *Post v. City and County Bank*[52] deals with the question of what constitutes an agency by estoppel or ostensible agency. A bank unsuccessfully sought to escape liability for surrendering securities to a person without authority under the principle of ostensible agency.

It seems to be well established by the decisions in California, "beyond question," says the court in *Oswald v. Schwartz*[53] that "an assignment of a chose in action may be orally made"—and why in the name of common sense should it not be so made? But it also seems settled by Adams v. Merced Stone Company,[54] not referred to in Oswald v. Schwartz, that a gift of a chose in action cannot be made in this informal manner. Possibly the decisions are reconcilable upon the ground that a greater degree of formality should be exacted in the case of a gift than in that of a transfer upon consideration, as was the assignment in Oswald v. Schwartz. Other grounds of reconciliation might be suggested which it is unnecessary in a brief review such as this to develop. But it may be doubted whether even in the case of a beneficial gift of a chose in action written evidence ought to be required. A trust in a chose of action may unquestionably be declared by parol. If the creditor can say to B "I hold this claim in trust for you," and thus establish a right in B, why should he not be empowered to effect the same result directly by saying to B "I give this claim to you"?[55]

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[51] 58 Cal. Dec. 363.
[52] 58 Cal. Dec. 254.
[53] 58 Cal. Dec. 496, 499.
[54] (1917) 176 Cal. 415, 178 Pac. 498.
[55] Roscoe Pound, Illinois Law Review, April, 1919, pp. 670, 692.

City Street Improvement Company v. Pearson[56] seems to sacrifice justice to technique, with some doubt as to the technique. Defendant gave plaintiff a promissory note to pay for street work done by plaintiff under a public assessment. The Supreme Court after devoting several hundred words to a discussion of the validity of the assessment found it void. The promissory note given in consideration of plaintiff's forbearance to sue was therefore in the opinion of the court a promise without legal foundation. Two justices dissented, without, however, stating the grounds of their dissent. Whether or not the dissenting judges proceeded upon the belief that the assessment was valid, it is by no means clear that the groundlessness of the claim is so obvious that the promise to pay made and received in good faith should not be sustained. It is certain that a layman, acting without legal advice, would have paid the claim, and it is almost as certain that most lawyers—save those specially skilled in taxation and assessment matters—would have failed to detect the fault in the assessment, even had they investigated the proceedings. Moreover the work was done, we may gather from the silence of the report, at a fair price and in a satisfactory manner. It is unfortunate that solemn engagements entered into freely between intelligent persons should sometimes fail of enforcement because of the absence of the technical requirement of a consideration. In City Street Improvement Company v. Pearson it may be doubted whether even this element of form was missing.

A case involving the definition of the breach of a contract of employment by the employer is *Percival v. National Drama Association.*[57] Mere non-payment of the employee's salary, even with the added circumstance that the employer closes up his business, are held not to amount to a discharge. There must be some word or act communicated to the employee.

VI. Property.

In the September number under this head, the reviewer spoke with much confidence as to the correctness and justice of the Supreme Court's decision respecting the rule for determining the priority of street assessment liens. It seemed to him perfectly obvious—as the court decided in a carefully prepared opinion in *Woodill & Hulse Electric Company v. Young,*[58]—that the latest

[56] 58 Cal. Dec. 518.
[57] 58 Cal. Dec. 511.
[58] 58 Cal. Dec. 42. See also 7 California Law Review, 453-4.

in time of public liens must be first in right. But now comes a learned writer in the University of Pennsylvania Law Review[59] with a criticism of the case. He thinks public assessments ought to follow the same rule as to priorities as do private liens. Apparently there is abundant authority in favor of the critic's view. The "self-evident" character of the proposition, to which reference was made in the September number of this Review, depends after all on whether one looks out or looks in. The present writer, however, still feels convinced by the reasoning of Mr. Justice Olney in the case referred to.

Questions arising out of the contract to sell real property continue to furnish much material for discussion. In *Lemle v. Barry*[60] and *Gaume v. Sheets*[61] imperfect attempts to declare a forfeiture justified the vendee in rescinding the contract and recovering payments already made. It was held, however, in a second action entitled Lemle v. Barry[62] that the vendee cannot recover his payments on the theory of rescission and also damages for breach of contract. In *House v. Piercy*[63] a plaintiff joined such causes of action in one complaint. It was held of course that he could have but one satisfaction. An interesting illustration of the change of possession necessary to constitute a part performance to take an oral contract for the sale of land out of the Statute of Frauds is *Hambey v. Wood.*[64] An oral agreement with a tenant who continues in possession is not enforceable, because there is no open and notorious change of possession following the contract.

Stock v. Plunkett[65] involved the interpretation of §1426 of the Civil Code with respect to the location of mining claims. A location notice complied with the requirements of the laws of the United States, but by reason of the omission of its date, did not conform with the California statute. Subsequent locators, however, actually saw the notice. It was held, with one justice dissenting, that they were bound by the defective notice.

Conditions and restrictions in regard to the use and alienation of property were involved in three interesting cases. *Los Angeles*

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[59] 68 University of Pennsylvania Law Review, 73.
[60] 58 Cal. Dec. 107.
[61] 58 Cal. Dec. 171. See also 8 California Law Review, 60, 7 California Law Review, 454.
[62] 58 Cal. Dec. 110.
[63] 58 Cal. Dec. 260.
[64] 58 Cal. Dec. 269.
[65] 58 Cal. Dec. 242.

Investment Company v. Gary[66] and *Title Insurance and Trust Company v. Garrott*,[67] decided in accordance with the provisions of § 711 of the Civil Code, that a condition against selling, leasing or renting to persons other than those of the Caucasian race was void. The statute adopts the stricter view as to the effect of such conditions, and the courts must yield to the legislative mandate. Unless the conveyances are very carefully drawn, restrictive covenants for the same purpose will be of small practical utility, if the decision in *Werner v. Graham*[68] be correct. That case holds that where land is subdivided and sold under a plan involving restrictions respecting the character of buildings to be erected, such restrictions, though included in every deed made by the owner of the tract, will not be enforced by a court of equity at the suit of purchasers within the tract, unless the deeds in some way refer to the common plan. It is not sufficient, the court holds, that all the parties knew of the existence of the building scheme. The decision, which is to our mind the most important one in the field of private law mentioned in this summary, seems to the writer unnecessarily narrow in its treatment of such covenants. The emphasis on "privity of estate," the sharp criticism of courts of equity for the invention of "equitable servitudes," the strict insistence on the "parol evidence rule," serve to strengthen the feeling that the opinion errs in too great insistence on the formal aspects of the situation. One would wish, however, an opportunity to study the subject more at length before rendering a final criticism.

Stone v. Daily[69] gives expression, we believe, to no new proposition of law. The amount of litigation, however, arising in connection with the law respecting delivery of deeds inevitably provokes the thought—why not by statute require greater publicity in the case of deeds of gift? Would, for example, a statute requiring recordation in the lifetime of the grantor as essential to the passage of title in case of voluntary conveyances be too extreme a limitation on the part of owners? *Earl v. Dutour*[70] holds that a conveyance "of the westerly one-half" of a described lot does not carry title to the middle of the road. The decisions in California on this subject present a curious unwillingness to

[66] San Francisco Recorder, Dec. 16, 1919.
[67] 29 Cal. App. Dec. 200.
[68] 58 Cal. Dec. 211.
[69] 58 Cal. Dec. 462.
[70] 58 Cal. Dec. 143.

carry out the provisions of §§ 1112 and 831 of the Civil Code, or perhaps more properly, a curious willingness to take advantage of the exception in those sections. It is unnecessary to do more than to refer to former comments in this Review.[71] *Erickson v. Rhee*[72] discusses the difference between an assignment and a sublease. *Richmond Wharf & Dock Co. v. Blake*[73] decides that an action for use and occupation lies against a wrongful occupier, by virtue of § 3334 of the Civil Code, which provides a rule of damages against a wrongful occupier, other than one wilfully holding over. It is not made altogether clear from the opinion whether or not the plaintiff recovered possession before commencing this action, nor whether the court deems that the action for mesne profits is superseded by the statutory provision cited. There is no magic in a form of action, but it should be remembered that a wrongful possessor may by the lapse of time become an owner, even while the action to recover the rental value against him is pending. There is some wisdom in a rule restricting an owner to an action for mesne profits against an adverse possessor, and permitting these damages only after or in connection with the recovery of the possession by him.

The law of succession, testate and intestate, gives rise to many questions. *Estate of Page*[74] reaffirms the principle that in our legal system, the word "heirs" does not necessarily connote blood kinship; it connotes merely relationship with respect to particular land or personalty. A person may have different heirs with respect to different objects of ownership. The "heirs" of a woman who inherited the separate property of her deceased spouse are, under subdivision 8 of section 1386 of the Civil Code the kin of the husband.

Estate of Dow[75] decides that the witnesses to a will need not sign in each other's presence, as some people supposed to have been held in Estate of Emart.[76] *Estate of Hartley*[77] illustrates the proposition that an olographic will may be good, though the resi-

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[71] 6 California Law Review, 465, 5 California Law Review, 71. The case of Earl v. Dutour is commented on in 18 Michigan Law Review, 58. For a good practical discussion of the rationale of the rule respecting boundaries on highways and streams see also a recent article, Presumption of Ownership ad filum, 146 Law Times, 378.

[72] 58 Cal. Dec. 470.

[73] 58 Cal. Dec. 398.

[74] 58 Cal. Dec. 448.

[75] 58 Cal. Dec. 165. On petition for rehearing, id. 265.

[76] (1917) 175 Cal. 238, 165 Pac. 707.

[77] 58 Cal. Dec. 402.

duary clause follows the signature. *Estate of Nutt*[78] relies upon the "presumption of undue influence" arising from a confidential relation between testator and a legatee. Such a method of statement seems to have become firmly established in this state, but it is believed that it is an inaccurate and unsatisfactory way of stating the matter.[79]

The equitable jurisdiction concerning wills was involved in *Osborn v. Hoyt,*[80] presenting the unusual situation of an action to enforce a contract to make a will devising specific real property brought against the devisor in his lifetime. *Brazil v. Silva*[81] involved an interesting application of equitable principles in respect to the law concerning the execution and revocation of wills. The court sustained a bill by the heirs of decedent to charge the defendant with a constructive trust in property received under the will on the ground that the defendant had fraudulently prevented its revocation. It may be of interest to compare the opinion with a note on the case of Estate of Silva[82] in an earlier volume of this Review. The points and authorities upon which the court relies are substantially the same as those in the comment referred to.

In re Mathewson[83] permits a husband, under some circumstances, to charge the wife's funeral expenses against her separate estate. *Estate of Gould*[84] and *Estate of McClelland*[85] involve questions of family allowance. In the former case an interlocutory decree of divorce gave the husband all the property "free and clear of all claim" on the part of the wife. She was, notwithstanding, held to be entitled to a family allowance. In Estate of McClelland, a separation agreement was construed as waiving the right to a family allowance on the husband's death. In *Estate of Ballou,*[86] though an adopted minor child was in receipt of a family allowance during administration of her adoptive father's estate, she was held entitled to interest on a legacy left her from the date of decedent's death. It was held to be a legacy for maintenance, and therefore not within the general rule allowing interest

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[78] 58 Cal. Dec. 431.
[79] See supra, n. 26.
[80] 58 Cal. Dec. 315.
[81] 58 Cal. Dec. 415.
[82] (1915) 168 Cal. 766, 145 Pac. 1015, 3 California Law Review, 350.
[83] 58 Cal. Dec. 391.
[84] 58 Cal. Dec. 113.
[85] 58 Cal. Dec. 248.
[86] 58 Cal. Dec. 145.

on legacies only after the expiration of one year from the testator's death.

VII. Torts.

Thomson v. Lafetra[87] sustained an action for throwing surface waters on a neighbor's land. Had the waters been of the character known as "flood waters," the defendant would have been justified in his conduct. Direct invasions of another's rights were also involved in *Scott v. Times Mirror Company*[88] reaffirming the proposition that malice is an issue in cases of libel where privilege is pleaded or where punitive damages are sought. *Mahano v. Echo Publishing Company*[89] holds that a publication of an article headed "Notices Mystify Policy Holders" was not libellous *per se* and were not made such by pleading an innuendo.

The control of dangerous instrumentalities was involved in *Smith v. Royer*[90] where scienter was shown by showing that defendant's wife had knowledge of a dog's vicious character. Why require scienter? The principle that every dog is entitled to one bite may have had some basis in a state of society where life was insecure and police protection inadequate. It is certainly not suited for a population largely urban. In *Minter v. San Diego &c. Company*[91] a defendant was exonerated from liability for the death of a boy sixteen years of age who was killed by an electric shock from defendant's wires while climbing a tree. The wires were strung twenty-seven feet from the ground and fourteen or sixteen inches from the tree. The court held that the defendant was not required to anticipate that boys would climb the tree. Opinions may well differ. The boy—almost a man—was not a trespasser and was not climbing the tree for amusement but to cut off branches. *Pemberton v. Arny*[92] raises the question as to what extent the Motor Vehicle Act[93] supersedes local ordinances. It was, however, not necessary to decide the question.

Orrin K. McMurray.

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[87] 58 Cal. Dec. 81.
[88] 58 Cal. Dec. 321.
[89] 58 Cal. Dec. 251.
[90] 58 Cal. Dec. 218.
[91] 58 Cal. Dec. 67.
[92] 58 Cal. Dec. 71.
[93] Cal. Stats. 1913, p. 639.